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No. 95-929

In the Supreme Court of the United States

OCTOBER TERM, 1995

THIYAGARAJAH ADHIYAPPA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Board of Immigration Appeals that petitioner's fear of persecution by a terrorist organization was not "on account of * * * political opinion" was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 58 F.3d 261. The decisions of the Board of Immigration Appeals (Pet. App. 25a-31a) and the immigration judge (Pet. App. 32a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1995, and rehearing was denied on September 13, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on December 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined in that Section as any person who has left his native country and is unable or unwilling to return there "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42).

2. Petitioner is a member of the Indian Tamil ethnic group, which has been involved in a protracted conflict between political, religious, cultural, and ethnic factions within Sri Lanka. The main competing groups in the Sri Lankan conflict are the Sinhalese, who comprise the majority of the population, and the Sri Lankan Tamils, who migrated to Sri Lanka from southern India many centuries ago. Indian Tamils, a small group of relatively recent immigrants brought to Sri Lanka by the British to serve as agricultural laborers, are "exploited and ignored" members of Sri Lankan society, and are "the untouchables of Sri Lanka." Pet. App. 5a.[1]

A major source of conflict between the competing factions is the proposal that a separate Tamil state be

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[1] Although petitioner testified that he and his family suffered violent assaults and property damage by Sinhalese forces, he has expressly waived any claim to asylum based upon a fear of persecution by the Sinhalese. Pet. C.A. Br. 3 n.3. Accordingly, petitioner's recitation of facts relating to alleged attacks by the Sinhalese is not relevant to the issues before the Court. See Pet. 4-5.

created within Sri Lanka. Sri Lankan Tamils generally favor that proposal, while Sinhalese and Indian Tamils generally oppose it. Pet. App. 5a. Certain militant Tamils have sought to advance the separatist cause through acts of terrorism. *Id.* at 27a-28a. Petitioner strongly opposes the creation of a separate Tamil state. *Id.* at 5a.

In September 1980, petitioner was hired as a geography instructor by Jaffna University in northern Sri Lanka. In March 1981, the chancellor of the university asked him to serve as an assistant student advisor, and he accepted the position. Petitioner's duties included advising freshman students, and observing and preventing terrorist activities on campus. As required by his job, petitioner provided the names of students suspected of participating in terrorist activities to Sri Lankan security forces and to campus authorities. Pet. App. 6a, 27a.

Petitioner testified that, as a student advisor, he informed on about 50 students. Pet. App. 27a. He claimed that each time government soldiers took action against militants in the area, he received threats from Tamil separatist groups that suspected him of informing on their members. *Id.* at 28a. He testified that, although the militants called him a traitor and threatened to kill him if he continued to inform on them, he did not heed their warnings because he was afraid that he might lose his job: "They [the terrorists] said if you continue to do that, we will kill you. But having no choice, I had to hold on to my job, I had to report to the university as well [as to] security forces." *Id.* at 16a. He added that he felt somewhat protected from the militants because the government was still firmly in control of Jaffna. By

mid-1983, however, the government's control over Jaffna began to erode, and petitioner fled Sri Lanka, fearing that his life was in danger. *Id.* at 28a.

3. Petitioner entered the United States in August 1983, on a non-immigrant student visa. He was convicted of theft offenses on April 14, 1987, and on February 28, 1989. In light of those convictions, the Immigration and Naturalization Service (INS) brought deportation proceedings against petitioner pursuant to former Section 241(a)(4) of the Immigration and Nationality Act (Act), 8 U.S.C. 1251(a)(4) (1988), which authorizes the Attorney General to deport any alien who, at any time after entry into the United States, is convicted of two or more crimes involving moral turpitude.[2] Petitioner conceded his deportability, but requested asylum pursuant to 8 U.S.C. 1158(a) and withholding of deportation pursuant to 8 U.S.C. 1253(h). Pet. App. 7a-8a.

In an oral decision issued on December 11, 1989, the immigration judge (IJ) found that petitioner was statutorily ineligible for asylum and withholding of deportation. Pet. App. 32a-37a. The IJ found that petitioner was opposed to the creation of a separate

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[2] Although Section 2 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, renumbered and in some instances revised the grounds for deportation, Section 602(d) of the 1990 Act (104 Stat. 5067) specified that those changes would not apply to "deportation proceedings for which notice has been provided to the alien before March 1, 1991." In any event, the same provision is now found at Section 241(a)(2)(A)(ii) of the Act, 8 U.S.C. 1251(a)(2)(A)(ii) ("Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.").

Tamil state, but concluded that petitioner had failed to demonstrate a well-founded fear of persecution on account of that political opinion. *Id.* at 34a. The IJ based his conclusion, in part, on a finding that petitioner had failed to prove that "the terrorist organization[s] have a threatening presence in all areas in which he could find a place to live." *Id.* at 35a. The IJ also cited a lack of evidence that petitioner's political opinion was "the concern of anybody at this time." *Id.* at 36a. Accordingly, the IJ ordered petitioner deported to Sri Lanka.

The BIA affirmed the decision of the immigration judge. Pet. App. 25a-31a. The BIA observed that petitioner "mainly fears Tamil militants, as they made threats against him over a decade ago for informing authorities about students involved in their movement." *Id.* at 28a-29a. It determined, however, that the evidence did not support petitioner's fear of persecution on account of political opinion, or any other ground specified in 8 U.S.C. 1158(a). Pet. App. 28a-29a. The BIA concluded that the militants' "interest would appear to be for retaliation against a perceived informer, which would not be persecution on account of a protected status; it is reasonable to assume that the retaliation would occur regardless of what political opinion, if any, [petitioner] held." *Id.* at 29a.

Petitioner sought review of the deportation order in the United States Court of Appeals for the Sixth Circuit. The court of appeals sustained the BIA's decision, concluding that it was supported by substantial evidence. Pet. App. 3a-24a.

ARGUMENT

The court of appeals' determination that the BIA's findings were supported by substantial evidence is fact-bound and does not conflict with any decision of this Court or of any other court of appeals. Thus, further review is unwarranted.

1. Petitioner argues that the court of appeals has unreasonably restricted asylum eligibility to cases in which the persecutor is motivated "exclusively by the applicant's political thought, and not to any degree by actions which the applicant has taken against the persecutor's interest." Pet. 11. That argument, however, mischaracterizes the decision below. The court of appeals did not address the issue of how an asylum claim should be treated where the alleged persecutor acts on the basis of mixed motives, some of which might be "on account of" the applicant's political opinion. Instead, the court upheld the BIA's determination that the terrorists who threatened petitioner did *not* act on account of any political opinion of petitioner, but rather acted on the basis of a retaliatory motive. Pet. App. 17a. That conclusion was based on evidence that the militant separatist organizations "warned" petitioner every time he "[gave] names," and threatened him "whenever soldiers went after the terrorists, indicating that [they believed that] he had informed the soldiers." *Ibid.* In addition, the court noted that "[p]etitioner did not present evidence that the terrorists were targeting antiseparatists who were not serving as government informants." *Ibid.* Thus, the BIA's determination "that it was [petitioner's] status as an informant, not his political opinion, that spurred [the

militants'] hatred," *ibid.*, was supported by substantial evidence.

The result reached by the Sixth Circuit is consistent with this Court's decision in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). In *Elias-Zacarias*, the Court reversed a Ninth Circuit decision holding that the BIA erred in rejecting a Guatemalan native's political asylum claim, which was based on evidence that he was threatened with forcible conscription into a guerrilla army. The Court observed that an asylum applicant must "provide *some* evidence of [the persecutor's political motive]," because the asylum statute "makes motive critical." *Id.* at 483. The Court also noted that, to obtain reversal of an adverse BIA decision, it is not enough for the applicant to point to evidence supporting his claim of a well-founded fear of politically-motivated persecution: "[H]e must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484. Applying that deferential standard of review, the Court concluded that the evidence did not compel the conclusion that the guerrillas' attempt to conscript Elias-Zacarias constituted persecution "on account of * * * political opinion," because the guerrillas might have attributed his reluctance to fight to a multitude of nonpolitical factors, such as a "fear of combat" or a desire to remain with his family. *Id.* at 482.

In this case, as in *Elias-Zacarias*, the threatened persecution was not necessarily on account of petitioner's political opinion because, as noted above, substantial evidence supports the BIA's finding that the terrorist threats against petitioner's life were

motivated by his activities as an informant.[3] Although petitioner's assertion that the terrorists had some political motives may be plausible based on the evidence presented, the BIA's findings must be sustained absent evidence "so compelling that no reasonable factfinder could fail to find" that the militants' threats were politically motivated. *Elias-Zacarias*, 502 U.S. at 484; see *id.* at 481 n.1 ("[t]o reverse the BIA finding we must find that the evidence not only *supports* [petitioner's] conclusion, but *compels* it"); *American Textiles Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 523 (1982) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence") (quoting *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)). In this case, the evidence simply did not permit reversal under the deferential standard set forth in *Elias-Zacarias*.

3. In attempting to demonstrate a "major conflict" among the circuits, petitioner catalogues cases in which courts have rejected the Board's finding that persecution was not "on account of * * * political

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[3] Petitioner attempts to distinguish *Elias-Zacarias* on the ground that the asylum applicant there was an uneducated peasant who wished to remain politically neutral, whereas petitioner is a university instructor who had openly expressed his anti-separatist political views. Pet. 17-18. However, in *Elias-Zacarias*, the Court expressly declined to decide whether the applicant's political neutrality qualified as a political opinion, 502 U.S. at 483, and instead decided the case based on the lack of compelling proof of the *persecutors'* political motivation.

opinion." Pet. 19-22. However, each of the cases cited by petitioner is distinguishable from the Sixth Circuit's decision here, which presents a textbook application of the principles enunciated in *Elias-Zacarias*.

For example, in *Osorio* v. *INS*, 18 F.3d 1017 (1994) (see Pet. 20), the Second Circuit held that the BIA erroneously presumed that a union activist's dispute with the government could not have a political dimension because it occurred in the context of an economic dispute. By so presuming, the court held, the BIA improperly discounted evidence of the persecutor's mixed motives, which appeared to be political as well as economic. 18 F.3d at 1029-1031; accord *Singh* v. *Ilchert*, 801 F. Supp. 313, 319 (N.D. Cal. 1992). The instant case, however, has no relation to "mixed motive" cases such as *Osorio* and *Singh*, because the BIA reasonably found that petitioner failed to establish that the militants had any concern about his political opinions. See Pet. App. 17a.

Likewise, *Sotelo-Aquije* v. *Slattery*, 17 F.3d 33 (2d Cir. 1994) (see Pet. 20-21), is distinguishable from this case. In *Sotelo-Aquije*, the Second Circuit reversed the BIA's decision that a municipal council member failed to prove a well-founded fear of persecution by a guerrilla organization. The council member's claim was based on evidence that the guerrillas threatened to harm him if he refused to resign from his post. The BIA had held that the guerrillas targeted the petitioner because of his status as a council member, not because of his political beliefs. 17 F.3d at 37-38. The Second Circuit set aside the BIA's holding as unsupported by substantial evidence, noting that the holding was contradicted by the BIA's own factual finding that only those council members who actively

opposed the guerrilla group became targets of its violence. *Id.* at 37.

Here, petitioner, like other Indian Tamils, had publicly advocated a unified Sri Lanka long before he became an informant, apparently without provoking threats from the terrorists. Indeed, he was a member of the Ceylon Workers' Congress, which strongly opposes the formation of a separate Tamil state. Pet. App. 21a. Thus, unlike in *Sotelo-Aquije*, nothing in the record contradicted the BIA's finding that it was petitioner's status as an informant, not his political opinion, that caused him to be singled out for persecution.

Finally, *Rivas-Martinez* v. *INS*, 997 F.2d 1143 (5th Cir. 1993), and *Perkovic* v. *INS*, 33 F.3d 615 (6th Cir. 1994) (Pet. 19-22), are not inconsistent with the court of appeals' holding in this case. In *Rivas-Martinez*, the Fifth Circuit held that the BIA erred in denying a Salvadoran woman's claim that she had a well-founded fear of political persecution, based on her refusal to assist a guerrilla organization. 997 F.2d at 1145-1146. The sole basis for the BIA's decision was that the petitioner had never communicated her political views directly to her persecutors; instead, she had offered a "non-political * * * excuse" for her refusal to assist the guerrillas, "in an effort to avoid * * * antagonizing" them. *Id.* at 1147. The Fifth Circuit held that remand was necessary because the BIA had not made a factual finding about the guerrillas' motivation for persecuting the petitioner, which could have been on account of her political beliefs despite her attempt to hide those beliefs. *Id.* at 1146. In contrast, the BIA explicitly found in the instant case that the militant Tamils were not motivated by their disagreement with petitioner's political beliefs, but instead were

interested in petitioner only because he was a perceived informer. Pet. App. 29a.

Perkovic v. *INS*, 33 F.3d 615 (6th Cir. 1994), is also inapposite. In *Perkovic*, the petitioners demonstrated that they had a well-founded fear that they would be persecuted if they returned to Yugoslavia because they had been active in promoting civil rights there for ethnic Albanians. One of the petitioners had been arrested, beaten, and interrogated about his political activities, which had included public display of the Albanian flag and of pro-Albanian posters. *Id.* at 616-617. His sister, the other petitioner, had been arrested after police found an Albanian flag and cassette recordings of Albanian ethnic music in her room. *Id.* at 617. The evidence presented in *Perkovic* clearly established that the petitioners were targeted on account of their political opinion. Here, however, petitioner did not present any evidence that he was interrogated or threatened due to his political opinion; instead, the threats against petitioner's life followed confrontations about his activities as an informant. In any event, any tension between the Sixth Circuit's decision in this case and its prior decision in *Perkovic* would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Far from demonstrating "a profound confusion about what this Court enunciated in *INS* v. *Elias-Zacarias*" (Pet. 23), the cases cited by petitioner show that the lower courts uniformly have required the BIA to consider evidence of the persecutor's motivation when evaluating whether threatened persecution is "on account of * * * political opinion." In the instant case, the Sixth Circuit denied relief because the evidence petitioner presented

did not justify reversal under the deferential standard of review required by *Elias-Zacarias*, not because of any legal controversy over the definition of "refugee."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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